Supreme Court, U.S.
FILED
APR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-236

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HARRY EICHENLAUB,

Petitioner,

v.

DAVID ALAN YURKY,

Respondent.

MEMORANDUM OF RESPONDENT, DAVID ALAN YURKY, SUGGESTING MOOTNESS

DAVID RUDOVSKY
First Assistant Defender
Defender Association of Philadelphia
121 N. Broad Street
Philadelphia, PA 19107
(215) 568-3190

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

Respondent, David Alan Yurky, by his counsel, David Rudovsky, respectfully submits this Memorandum of Respondent, David Alan Yurky, Suggesting Mootness to advise the Court of certain facts which in Respondent's view render this cause moot:

1. On August 8, 1985, Petitioner filed a Petition for Writ of Certiorari in this Court. The Writ was granted on January 13, 1986, on the issue of whether Petitioner violated Respondent's rights to due process of law by his transfer from a County Prison to a State Correctional Institution without a hearing.

2. At the time that the Petition for Writ of Certiorari was filed, petitioner Harry Eichenlaub was deceased, having died on July 13, 1985. See Brief for Petitioner, 1, n.1. This fact was unknown to Respondent until the filing of Petitioner's Brief (March 27, 1986), and apparently was not called to this Court's attention until that time.

3. No substitution by a proper representative of the deceased was made within six months of petitioner's death; accordingly, unless the automatic substitution provisions of Rule 40 of the Court are applicable, this case abates as a matter of law. Rule 40.1.

4. This action has been litigated as a damages claim against Harry Eichenlaub in his personal capacity under 42 U.S.C. Section 1983. J.A. 26-27. The theory of this case is that petitioner violated Respondent's rights to due process of law under the Fourteenth Amendment by depriving him of a hearing in connection with his transfer to a state prison facility. Any damages for this violation can be assessed solely against petitioner and not his successor in office or the employer-county (which is not a party to the suit). No claim has been made that petitioner acted in accord with official governmental policy. See *Kentucky* v. *Graham*, 473 U.S. ___, 105 S.Ct. 3099 (1985); *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658

(1978); *Rizzo* v. *Goode*, 423 U.S. 362 (1976). Cf. *Bender* v. *Williamsport Area School District*, No. 84-773 (March 25, 1986). As the Court stated in *Kentucky* v. *Graham*, *supra*, 105 S.Ct. at 3105:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 237-238 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n.55 (1978) . . . Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

This is not an official capacity suit and no automatic substitution for petitioner Eichenlaub can be effected under Rule 40.

WHEREFORE, Respondent Yurky suggests that this case is moot. Respondent moves this Court to enter an Order pursuant to Rule 40 that the matter is abated and that certiorari was improvidently granted. In the alternative, the Court should defer consideration of this issue to the hearing of the case on the merits, and to order any supplemental briefing that may be appropriate.

Respectfully submitted,

DAVID RUDOVSKY
First Assistant Defender
Defender Association of Philadelphia
121 N. Broad Street
Philadelphia, PA 19107
(215) 568-3190